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No. 81-1863

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

UNITED STATES OF AMERICA, *et al.*, *Appellants;*

v.

MARY T. GRACE, *et al.*, *Appellees.*

On Appeal From The United States Court Of Appeals For The District Of Columbia Circuit

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BRIEF FOR APPELLEES

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QUESTION PRESENTED

Whether peaceful political expression which is unrelated to the administration of justice and which is not basically incompatible with the normal use of the sidewalk surrounding the Court is protected by the First Amendment.

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BRIEF FOR APPELLEES

STATUTORY PROVISIONS INVOLVED

40 U.S.C. § 13k provides:

> It shall be unlawful to parade, stand, or move in processions or assemblages in the Supreme Court Building or grounds, or to display therein any flag, banner, or device designed or adapted to bring into public notice any party, organization, or movement.

18 U.S.C. § 1507 provides:

> Whoever, with the intent of interfering with, obstructing, or impeding the administration of justice, or with the intent of influencing any judge, juror, witness, or court officer, in the discharge of his duty, pickets or parades in or near a building housing a court of the United States, or in or near a building or residence occupied or used by such judge, juror, witness, or court officer, or with such intent uses any sound-truck or similar device or resorts to any other demonstration in or near any such building or residence, shall be fined not more than $5,000 or imprisoned not more than one year, or both.

Other relevant statutory provisions are set forth in the Appendices[1] to Appellees' Motion to Affirm (M.A.App. 31a-33a) (40 U.S.C. §§ 13a-13p) and Brief on the Merits (Grace App. 1a-3a).

STATEMENT

A. Facts

In May 1978 appellee Thaddeus Zywicki, an elderly Catholic missionary, stood alone on the sidewalk near the curb line in front of the Supreme Court near a coin-operated *Washington Star* vending machine (M.A.App. 1a-21a, 4a)(Complaint, *Grace* v. *Burger*, No. 81-1205 (D.D.C. filed May 13, 1980 ¶ 12).[2] Mr. Zywicki was distributing a handbill which contained a reprint of a letter to the editor of *The Washington Post* from a

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[1] References to the various appendices filed with the Court shall be as follows:

Appendix to Jurisdictional Statement (J.S.App.)

Appendix to Motion to Affirm (M.A.App.)

Appendix to Appellees' Brief on the Merits (Grace App.)

Also, certain transcripts relevant to this case, and other non-record material, have been filed with the Clerk as "Lodging Filed on Behalf of Appellees (filed November 15, 1982)(Exhibits A-G)(hereinafter, e.g., Lodging Exhibit B 33)."

[2] Since the District Court dismissed appellees' Complaint for failure to exhaust administrative remedies (J.S.App. 69a), the facts outlined in the Complaint are to be taken as true. Both the Government and the District Court have accepted the factual allegations of the Complaint (J.S.App. 3a & n.3, 56a).

The District Court's ground for dismissal has never been advanced or adopted by the Government. (*See* Brief for Appellants at 3 n.2; *Grace* v. *Burger*, J.S.App. 1a-47a, 5a-8a); and Brief for [Government] Appellees in the Court of Appeals at 4 ("we do not advance the exhaustion of administrative remedies reasoning of the District Court . . .").

United States Senator concerning the subject of removal of unfit federal judges (M.A.App. 4a, 11a)(Complaint ¶ 12 and Exhibit 1 to Complaint). A Supreme Court police officer approached Mr. Zywicki and informed him that Title 40 of the federal code prohibited the distribution of leaflets on Supreme Court grounds, which included the sidewalk abutting the curb (M.A.App. 4a-5a). Fearing arrest, Mr. Zywicki left the grounds.

On January 8, 1980, Mr. Zywicki returned to the sidewalk in front of the Court, this time distributing handbills containing an invitation to attend a religious meeting termed "a religious reflection in solidarity with the oppressed peoples of Central America" (M.A.App. 5a, 12a)(Exhibit 2 to Complaint). An officer soon approached Mr. Zywicki and ordered him to cease leafletting or face arrest. Fearing arrest, Mr. Zywicki again left (M.A.App. 5a).

In February, 1980, Mr. Zywicki once again attempted to distribute leaflets on the sidewalk in front of the Court near the newspaper vending machines (M.A.App. 5a-6a). Counsel had informed Mr. Zywicki that a judge of the Superior Court of the District of Columbia, in a criminal prosecution under 40 U.S.C. section 13k, had narrowed the application of § 13k to conduct performed with the specific intent to influence, impede or obstruct the administration of justice (*See* M.A.App. 5a-6a, 18a-19a)(Lodging Exhibit B).[3] When Mr. Zywicki informed counsel that he wanted to distribute handbills concerning hu-

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[3] In *United States* v. *Ebner*, No. M-12487-79 (D.C.Super.Ct. Jan. 22, 1980) (Hannon, J.), demonstrators against the death penalty staged mock executions across the street from the Court. Those who had been "executed" were carried across the street and laid upon the steps of the Court, where they were arrested and charged with two counts of violating 40 U.S.C. § 13k ("unlawful parading" and "unlawful device") and one count charging unlawful entry under 22 D.C. Code § 3102 (1981). Defendants, among whom was appellee Grace, filed motions to dismiss, attacking the facial constitutionality of § 13k. A transcript of the oral argument has been filed with the Clerk

man and political oppression in Guatamala, counsel informed Mr. Zywicki that § 13k, as narrowed by the Superior Court, would allow such leafletting (M.A.App. 5a).

On February 4, 1980, again peaceably standing near the vending machines and the curb line, Mr. Zywicki distributed a few handbills, but was soon approached by a Supreme Court police officer who warned Mr. Zywicki that unless he ceased leafletting, he would be arrested. Mr. Zywicki stated that he understood the statute had been modified by a judge (M.A.App. 6a). The officer used a walkie-talkie and apparently called someone inside the Supreme Court building. Eventually a Mr. White emerged from the building and informed Mr. Zywicki that the statute had not been changed and that Mr. Zywicki was subject to arrest for leafletting on Supreme Court grounds (*id.*). Mr. Zywicki protested the fact that the newspapers were allowed to be sold and distributed while he was prohibited from distributing printed matter of his choosing (M.A.App. 6a), and asked why the statute did not forbid raising and lowering the American flag, displayed on the outside grounds of the Court (*id.*). To avoid arrest, however, Mr. Zywicki once again left the grounds of the Court (*id.*). Fearing arrest, he has not returned (M.A.App. 6a).

Appellee Grace, upon learning of these events, became alarmed that a statute could prohibit peaceful expression on

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(Lodging Exhibit B). The Government appealed Judge Hannon's limiting construction to the District of Columbia Court of Appeals (*U.S.* v. *Ebner*, No. 80-165) where it was consolidated with another case which challenged the facial constitutionality of § 13k, *United States* v. *Turner*, No. 80-115. The cases were argued on November 25, 1980, reargued in February, 1982, and proceedings have been deferred pending resolution of the case at bar.

A copy of the transcript of oral argument challenging § 13k in *United States* v. *Turner*, No. M-5572-79 (D.C.Super.Ct. Oct. 2, 1979)(Hess, J.) has been filed for the Court's convenience (Lodging Exhibit A).

the grounds of the Court (M.A.App. 4a). Therefore, on March 17, 1980, Ms. Grace stood on the Supreme Court sidewalk near the curb line and just a few feet from the newspaper vending machines with a sign (measuring approximately four feet by two and a half feet) inscribed with the *verbatim* text of the First Amendment (M.A.App. 4a, 6a). She stood in a peaceable, orderly manner, had no intent to interfere with the Court's work, and did not even know whether the Court was in session (M.A.App. 6a-7a). Rather, *"[h]er purpose was to communicate the message of the First Amendment in a public place peculiarly suited for such a message"* (M.A.App. 7a)(emphasis added).

Shortly after noon, a Supreme Court police officer, appellant Drexhagen, ordered Ms. Grace to leave the grounds of the Court and go across the street, citing 40 United States Code (M.A.App. 7a). Ms. Grace asked the officer if he had read her sign and, if so, why she had to move, stating that she had just as much right as the newspapers to be present (M.A.App. 7a). Officer Drexhagen informed Ms. Grace that she would have to follow him inside the building if she refused to move and, fearing arrest, she left the Court grounds (M.A.App. 7a). Ms. Grace is eager to exercise her First Amendment rights on the Court grounds and would return but for the spectre of arrest (M.A.App. 7a).

B. Proceedings In The District Court

On May 13, 1980, appellees Grace and Zywicki filed a verified[4] Complaint in the District Court seeking declaratory and injunctive relief on the grounds that § 13k, both on its face and as applied, abridges the First and Fifth Amendments

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[4] Under Rule 1-9 of the Rules of Procedure in the United States District Court for the District of Columbia (1972), a "verified" document may be used wherever the Federal Rules require submission of a sworn affidavit.

(M.A.App. 1a-10a).[5] The parties filed cross-motions for summary judgment and supporting documents. The only material factual dispute was whether § 13k was selectively enforced.

The motions for a preliminary injunction and for summary judgment were argued in the District Court on June 11, 1980 (M.A.App. 39a-57a)(Lodging Exhibit C). During this hearing, Government counsel conceded that § 13k, by its terms, renders unlawful the placing and maintaining of newspaper vending machines on the Court grounds (M.A.App. 51a-56a). Subsequent to argument on the motion, the Government filed "Defendant's Supplemental Memorandum" (R.Doc. 6) in which the Government conceded that there were newspaper vending machines on the grounds of the Court. "Therefore, there is no disputed fact" (Defendants' Supplemental Memorandum 2)(filed June 23, 1980) (R.Doc. 6).

Although none of the parties presented or argued the issue, the District Court dismissed the Complaint for failure to exhaust administrative remedies, holding that Ms. Grace and Mr. Zywicki should have applied to the Marshal for a permit (J.S.App. 65a-69a).[6]

C. Proceedings In The Court Of Appeals

The Court of Appeals held that dismissal for failure to exhaust administrative remedies was "plainly erroneous" (J.S. App. 5a). In light of the undisputed facts and because all parties had briefed and argued the merits of § 13k's con-

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[5] The Complaint alleged, *inter alia*, that § 13k was vague, overbroad, acted as a prior restraint, and violated the equal protection principles of the Fifth Amendment's due process clause.

[6] There are no available procedures for seeking a permit to engage in expressive activity on Supreme Court grounds (*see Grace* v. *Burger*, J.S.App. 5a-8a). Moreover, Marshal Wong's Affidavit clearly states that *no* expressive activity on the Court's grounds is allowed (M.A.App. 38a), thus rendering futile any attempt to seek a permit.

stitutionality, the Circuit Court reached the merits of the case and held § 13k unconstitutional on its face as repugnant to the First Amendment[7] (J.S.App. 2a., 8a-9a & n. 9).

In reaching this conclusion, the Court of Appeals first noted that § 13k, as interpreted by the Marshal, prohibits all expressive conduct, including all leafletting, picketing and even lone, solitary sign-holding, on Supreme Court grounds (J.S.App. 2a, 6a). Although the court recognized that some public property may be dedicated to uses which are inconsistent with First Amendment activity, and that the interest in preserving the integrity of the judicial process in the public mind is a legitimate governmental interest (J.S.App. 20a-21a), the court followed the guiding principle of *Grayned* v. *City of Rockford*, 408 U.S. 104, 116 (1972), which focuses upon "whether the manner of expression is basically incompatible

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[7] The Government, in attempting to persuade the Court of Appeals to rehear the case *en banc*, mischaracterized the holding of the panel majority. As illustrated below, the Government's cast of the court's holding bears little resemblance to the actual holding of the court, which premised its ruling on the fact that the primary interest asserted by the Government is specifically protected by 18 U.S.C. § 1507:

Appellees' Petition for Rehearing and Suggestion for Rehearing *En Banc:*

"The panel . . . held that the Supreme Court grounds constituted a 'public forum' . . ." (*Id.* at 6, R.Doc.23);

"The sole basis for the majority's decision was its determination that the Supreme Court grounds constitute a public forum" (*Id.* at 10).

Grace v. *Burger:*

"Since we are unable to find any other significant governmental interest to justify the *absolute* prohibition of *all* expressive conduct contained in 13k, we hold that the statute is unconstitutional and void" (J.S.App. 2a)(emphasis supplied). (*Accord*, J.S.App. 27a).

with the normal activity of a particular place at a particular time" (J.S.App. 19a-20a), an issue which the Government never addressed (J.S.App. 25a).[8]

The court also noted that, while Congress had acted in specific furtherence of the appearance of justice interest in enacting 18 U.S.C. § 1507, the legislative history of § 13k does not discuss the appearance of justice but only maintaining the dignity of the Court (J.S.App. 22a-23a, nn. 17, 18). Since § 13k prohibits activity unrelated to the administration of justice, the court found § 13k's absolute ban overinclusive (J.S.App. 24a-26a). Applying the overbreadth standing doctrine (J.S.App. 27a) the court held the statute void on its face (J.S.App. 2a, 27a) and therefore did not reach the issue of the statute's application to Ms. Grace and Mr. Zywicki.

The Court of Appeals considered whether § 13k could be saved by a limiting construction, but found that, in view of the legislative history (M.A.App. 34a) and the "decades of consistently broad enforcement" (J.S.App. 27a-29a), the statute was not susceptible to a limiting construction.

Judge MacKinnon dissented on the ground that § 13k could be saved by a limiting construction narrowing its application to prohibit the propagandizing and promotion of political parties, organizations, or movements for various causes (J.S.App. 32a).

D. Statutes Applicable To Supreme Court Grounds

There is, in addition to § 1507, a statutory scheme specifically applicable to the Supreme Court grounds (of which section

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[8] Significantly, prior to oral argument before the Court of Appeals, the court took judicial notice of a newspaper article appearing in *The Washington Star* on January 6, 1981 (M.A.App. 26a), which contained a photograph and a story depicting the filming of "The First Monday in October" on the steps of the Supreme Court (M.A.App. 22a-30a). The events depicted in the *Star* photograph and news article were thus incorporated into the record of this case.

13k in a part)(M.A.App. 31a-33a). Under this scheme duties relating to the care and custody of the Supreme Court building are delegated to the Marshal of the Supreme Court, who is deemed the "superintendent" of the building. 40 U.S.C. § 13c (*id.*). Section 13f empowers the Marshal, "under the general supervision and direction of the Chief Justice," to employ special officers to police the grounds (M.A.App. 32a). Section 13h renders it unlawful to "offer or expose any article for sale" in the building or on the grounds or "to display any sign, placard, or other form of advertisement therein; or to solicit . . . subscriptions or contributions therein" (*id.*). Sections 13i and 13g prohibit various forms of disorderly conduct as well as prohibiting the making of any "harangue or oration" or using any "loud, threatening or abusive language" in the building or grounds (*id.*).

A significant provision in the statutory scheme is § 13*l* which empowers the Marshal to prescribe regulations (subject to approval of the Chief Justice and publication), "as may be deemed necessary . . . for the maintenance of suitable order and decorum within the Supreme Court Building and grounds" (M.A.App. 32a).

Section 13o allows the Marshal to suspend application of sections 13g-13k "to permit the observance of authorized ceremonies" within the building or grounds (M.A.App. 33a). Finally, section 13p defines the "grounds" of the Court basically as encompassing the block upon which the Court is located, up to the face of the curbs of the sidewalk surrounding the grounds (*id.*). Under § 13m prosecutions under the scheme are to be in the Superior Court for the District of Columbia (*id.*). A violation of § 13k may result in a fine of $100 and/or 60 days incarceration.

SUMMARY OF ARGUMENT

The issue in this case is whether a statute which bans all forms of expression—including innocuous pristine expression unrelated to the administration of justice—anywhere on the grounds of the judicial branch of government is consistent with

the First Amendment. The Government urges the Court to hold that the Court's grounds constitute a vacuum in which the First Amendment has no application. Thus, the Government asks the Court to elevate itself above every other court, every other branch and agency of government, and even above the Constitution itself.

This Court consistently has held that peaceful political expression lies at the "core" of the First Amendment. *NAACP* v. *Claiborne Hardware Co.*, 102 S.Ct. 3409, 3427 (1982); *Brown* v. *Hartlage*, 102 S.Ct. 1523, 1528 (1982). The Government lacks power to reach or restrict the hard core of any fundamental right, particularly those guaranteed by the First Amendment. Each fundamental constitutional provision creates a zone of "hard core" protection inpenetrable by government. For example, just as the Sixth Amendment absolutely forbids the Government from depriving a criminal defendant of the right to trial by jury, the Fifth Amendment absolutely forbids *forcing* the involuntary testimony of a criminal defendant. Likewise, the Government lacks power to absolutely prohibit all forms of peaceful expression occurring anywhere on government property regardless of the normal uses of the place and regardless of the need for the restriction.

Moreover, any regulation which even incidentally trespasses upon protected expression must serve a recognized and compelling state interest. To survive scrutiny, any constraint imposed must be 1) unrelated to the suppression of expression, 2) closely tailored to the furtherence of a compelling interest, and 3) not unduly restrictive of First Amendment freedoms. *Larson* v. *Valente*, 102 S.Ct. 1673, 1685 (1982); *Brown* v. *Hartlage*, *supra*, 102 S.Ct. at 1529.

The primary justification asserted by the Government in support of section 13k—protection of the appearance of justice—is not mentioned anywhere in the legislative history. That precise interest, however, specifically motivated the *same* Congress that enacted § 13k to consider legislation of which (now) 18 U.S.C. § 1507 was a part. In stark contrast to § 13k's sparse legislative history, the legislative history of

§ 1507 reflects acute Congressional concern for striking a proper balance between the governmental interest in protecting the integrity of the administration of justice and the individual and societal interest in protecting peaceful political expression.[9] None of the other asserted governmental interests—relating to decorum or the symbolic value of the Court—justifies an absolute ban on both political expression and even innocent assemblages throughout the Court's grounds. Indeed, if the Supreme Court is a symbol of anything, it is a symbol our commitment to civil liberty, freedom of expression, and equal justice under law.

Significantly, the Government has never offered evidence to demonstrate that § 13k is a narrowly drawn restriction which substantially furthers a compelling, legitimate interest in a manner least restrictive of First Amendment rights.

Even if the Court recognizes as compelling the interest in preserving the appearance of justice on Court grounds, § 13k is overinclusive in prohibiting both expressive and innocent associational activity *unrelated* to the administration of justice. Section 13k also is fatally underinclusive because the Government would allow demonstrations in or across the street from the Court, "at locations that scarcely diminish their impact" (Brief for Appellants 23)(hereinafter, Government Brief). Thus, under the Government's own argument, § 13k still allows activity which directly threatens the very interest asserted in its defense.

Enforcement of § 13k is left to the arbitrary, standardless discretion of the Marshal. This has created not only the danger but the reality of selective enforcement. Film producers have

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[9] *Compare* S.Rep. No. 719, 81st Cong., 1st Sess. 3 (1949), *reprinted in* 1949 U.S.Code Cong. & Ad. News 1827 (M.A.App. 34a-36a) *and* H.R.Rep. No. 814, 81st Cong., 1st Sess. 2 (1949)(Grace App. 5a), *with* S.Rep. No. 732, 81st Cong., 1st Sess. 4 (1949)(Grace App. 14a) *and* H.R.Rep. No. 1281, 81st Cong., 1st Sess. 3 (1949)(Grace App. 17a). *See* section I(A)(2), *infra*.

been allowed to film commercial movies on the Court steps, *The Washington Post* continues to this day to disseminate its written opinions and analyses, while Ms. Grace and Mr. Zywicki are threatened with arrest.

Section 13k's vague, overinclusive terms reflect the antiquated law that it is. Its predecessor, 40 U.S.C. § 193g—which has been held facially unconstitutional—was enacted in 1882, long before development of modern First Amendment standards. Its absolute prohibition of pure expression is an insult to the First Amendment. Forms of expression far less deserving of protection than the pristine rights at issue here have received broad solicitude by the Court. *E.g.*, *Schad* v. *Borough of Mt. Ephraim*, 452 U.S. 61 (1981)(live—including nude—entertainment); *Redrup* v. *New York*, 386 U.S. 767 (1967)(pornography). Even disruptive speech is accorded protection. *Terminiello* v. *Chicago*, 337 U.S. 1 (1949). Also, interests at least as, if not more, compelling than those offered here have not sufficed to justify subordination of a fundamental constitutional right. *See Globe Newspaper Co.* v. *Superior Court*, 102 S.Ct. 2613 (1982)(interest in protecting minor victims of sexual abuse did not justify mandatory closure of trial during minor victim's testimony); *A Quaker Action Group* v. *Morton*, 460 F.2d 854, 860 (D.C.Cir. 1971) (interest in safety of the President insufficient to justify broad restrictions of First Amendment rights), *aff'd in part, remanded in part*, 516 F.2d 717 (D.C.Cir. 1975).

Finally, since this case involves the Court itself, the provisions of 28 U.S.C. § 455 raise the issue of disqualification. The Chief Justice, as a party, must disqualify himself under § 455(b)(5)(i) and Justice O'Connor who, along with the Chief Justice, is depicted in photographs "standing" in an "assemblage" (Lodging Exhibit F 171) and "moving" in a "procession" (Lodging Exhibit G 173), should also consider disqualification under §§ (b)(1) and (b)(5)(iv). Appellees submit that the other members of the Court need not recuse themselves, except for those Justices who agree with the Government's argument

that—for whatever reason—interests unique to this Court justify an absolute ban on expression applicable *only* to the apex of the judicial branch of government.

Congress, in enacting § 13k, erected an iron curtain of silence around the seat of an entire branch of government. Contrary to the Government's glib assurance that § 13k is a narrow, minimal intrusion on protected rights, necessary to instill public confidence in the integrity and dignity of the Court, the truth is that:

> an enforced silence, however limited, solely in the name of preserving the dignity of the bench, would probably engender resentment, suspicion, and contempt much more than it would enhance respect.
>
> *Bridges* v. *California*, 314 U.S. 252, 270-71 (1941)(Black, J.).

ARGUMENT

I. PEACEFUL POLITICAL EXPRESSION WHICH IS UNRELATED TO THE ADMINISTRATION OF JUSTICE AND WHICH IS NOT BASICALLY INCOMPATIBLE WITH THE NORMAL USE OF THE SIDEWALK SURROUNDING THE COURT IS PROTECTED BY THE FIRST AMENDMENT

A. Section 13k Prohibits A Broad Range Of Both Innocent And Expressive Activity

1. The starting point of any statutory analysis is the language used by Congress. *Watt* v. *Energy Action Educational Foundation*, 102 S.Ct. 205, 213 (1981). Title 40 U.S.C. § 13k provides:

> It shall be unlawful to parade, stand, or move in processions or assemblages in the Supreme Court Building or grounds, or to display therein any flag, banner, or device designed or adapted to bring into public notice any party, organization, or movement.

As Judge MacKinnon observed in the court below, the statute is divisible into two parts (J.S.App. 31a)(MacKinnon, J., dissenting). The first part forbids parading, or moving in proces-

sions or assemblages, as well as standing in assemblages. It applies only to groups (*id.*), but it does not require that the group be engaged in expressive activity since the second clause of § 13k, which does concern expressive activity, is in the disjunctive rather than the conjunctive. Thus, contrary to the Government's argument that § 13k does not prohibit private discussions on Court grounds (*see* Government Brief 13-14 n. 4), the plain language of the statute prohibits standing in assemblages, regardless of the purpose of the assemblage.

The second part of the statute proscribes displaying on Court grounds "any flag, banner, or device designed or adapted to bring into public notice any party, organization, or movement." Even Judge MacKinnon acknowledged that "[a]lthough 'flag' and 'banner' may describe a readily identifiable group of objects, the inclusion of the word 'device' makes difficult the task of limiting these three terms to a particular class of objects" (J.S.App. 32a). In fact, "it would appear that the reach of 'device' would include any object that is capable of display . . ." (*id.*).

The Government's characterization of § 13k as a narrow statute which minimally intrudes upon speech (*e.g.*, Government Brief 32, J.S.App. 6) is an exercise in verbal gymnastics. The fact is, § 13k's sweeping, vague terms evince no consideration whatsoever for fundamental First Amendment concerns. Enforcement of the statute is left to the standardless discretion of the Marshal (as supervised by the Chief Justice) and the Supreme Court police. Although 40 U.S.C. § 13*1* empowers the Marshal to promulgate regulations and standards of enforcement (*see Grace* v. *Burger*, No. 80-1205)(D.D.C. Aug. 7, 1980)(Oberdorfer, J.) (J.S.App. 63a)(*see* Lodging Exhibit C 97-99) the only regulation ever enacted under § 13*1* concerns the hours during which the Court is open to the public (J.S.App. 6a n. 6). The longstanding practice of the Marshal is to enforce § 13k against all expressive activities, including lone leafletting and stationary signholding (Declaration of Marshal Wong, M.A.App. 38a; Government Brief 3).

2. The scope of both actual and potential application of § 13k is discussed *infra*, at I(A)(3), but before examining the sweeping scope of § 13k, it is extremely valuable to detail its legislative history.

Until October 1935, the Supreme Court was housed in the United States Capitol building. Protection and policing of the Capitol building and grounds was governed by 40 U.S.C. § 161 *et seq.* (Act of Aug. 15, 1876). Section 193g, which originally was enacted in 1882, provided:

> It is forbidden to parade, stand, or move in processions or assemblages in said United States Capitol Grounds, or to display therein any flag, banner, or device designed or adapted to bring into public notice any party, organization, or movement, except as hereinafter provided in sections 193j and 193k of this title [allowing suspension of § 193g for authorized ceremonies].[10]

(Grace App. 3a).

When the Supreme Court moved into its present building, the building and grounds were policed by officers commissioned by the District of Columbia. *See* H.R.Rep. No. 814, 81st Cong., 1st Sess. 1-2 (1949)(Grace App. 4a-5a); 95 Cong. Rec. H7958 (June 20, 1949)(statement of Rep. Bryson)(Grace App. 8a).[11] In 1949, however, legal advisors to the District of Columbia determined that the District lacked authority to commission officers to police the Court. *Id.* "As a result, the entire Supreme Court went into conference and this bill was really drawn at the suggestion of, if not actually by, the members of the Supreme Court." *Id.*[12]

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[10] There are no House or Senate reports, debates, or hearings reflecting Congress' reasons for promulgation of § 193g. Apparently, it was not a controversial matter.

[11] Representative Bryson was a member of the House Judiciary Committee which authored the report on H.R. 4948, now codified as 40 U.S.C. §§ 13f-13p.

[12] In June 1949, the Court consisted of Chief Justice Vinson and Justices Black, Frankfurter, Rutledge, Douglas, Murphy, Reed, Burton, and Jackson. Justice Minton commenced service on October

The legislative scheme of which § 13k is a part closely tracks 40 U.S.C. §§ 193a-g. Basically, Congress extended to the Court the scheme which had been protecting the Capitol grounds since 1882. Congressman Celler, who was Chairperson of the House Judiciary Committee which authored the House Report on H.R. 4948, 81st Cong., 1st Sess. (1949)(now §§ 13f-p), explained:

> all this bill does . . . is to apply the same rules to the Supreme Court building and its adjoining grounds as are now applicable to the Capitol itself—no more and no less.
>
> 95 Cong. Rec. H8962 (July 6, 1949) (statement of Rep. Celler)(debate concerning H.R. 4948)(Grace App. 9a).

Accord, H.R.Rep. No. 814, 81st Cong., 1st Sess 1 (1949)(Grace App. 4a).

Congress' only articulated purpose in enacting § 13k was to preserve the dignity and decorum of the Court's grounds. The House Report curtly states:

> It is the belief of the Committee on the Judiciary that in keeping with the dignity of the highest Court in the land, provision should be made for the policing of its building and grounds similar to that which is made for the United States Capitol.
>
> H.R.Rep. No. 814, 81st Cong., 1st Sess. 2 (1949)(Grace App. 5a).

12, 1949, and Justice Clark began service on August 24, 1949.

The House Report indicates that §§ 13f-13p were drafted by Mr. Perley, legislative counsel to the House of Representatives, at the request of then Marshal Thomas E. Waggaman. H.R.Rep. No. 814, 81st Cong., 1st Sess. 2 (1949)(Grace App. 5a). When the District of Columbia determined that it lacked authority to commission special police officers for the Court, the Chief Justice directed the Marshal "to have a bill prepared similar to the legislation providing for the Capitol Police." *Id.* Mr. Perley then drew up a bill "modeled upon the Capitol Police legislation," *id.*, and submitted it "to the Court for its approval." *Id.* The Court approved the bill subject to unspecified changes which were made on May 26, 1949. *Id.*

The Senate Report mirrored a similar concern:

> In keeping with the dignity which should surround the Supreme Court of the United States and the building and grounds which house it, the committee feel that this legislation should be enacted promptly.
>
> S.Rep. No. 719, 81st Cong., 1st Sess. 2 (1949), *reprinted in* 1949 U.S. Code Cong. & Ad. News 1827, 1829 (M.A.App. 34a, 36a).

The only debate on H.R. 4948 was in the House. Representative Anderson criticized § 2 (now § 13g) as making criminal the innocent act of walking on the grass. 95 Cong. Rec. H7958 (June 20, 1949)(statement of Rep. Anderson)(Grace App. 8a). The following colloquy constitutes the only reference to the proposed scheme's impact on First Amendment rights:

> Mr. Bryson: I am sure, knowing the gentleman as I do, that he would know the Supreme Court would be as reasonable about these matters as the Commissioners have been or as the police officers have been. Since I have been in Congress I remember seeing pickets marching in and around the Supreme Court Building.
>
> Mr. H. Carl Anderson: I do not object to section 6 [now § 13k] concerning which the gentleman is speaking, but I do object to these people who happen to step upon the grass, without knowing of such a penalty, being subject to this penalty . . .
>
> Mr. Bryson: I am sure the gentleman knows that similar provisions are written into the law protecting the Capitol and its grounds. I have not heard of any flagrant restrictions on the part of any legitimate use of the building or grounds.
>
> *Id.*

Thus, the only expressive activity specifically sought to be precluded by § 13k was the marching of pickets and the only governmental interest articulated in support of the scheme was the promotion of the dignity and decorum of the Court. Sections 13f-13p were enacted into law in 1949. Pub.L. No. 81-250, 63 Stat. 617 (Aug. 18, 1949).

The cursory legislative history relating to § 13k suggests that promulgation of the statute was a perfunctory, housekeeping measure, designed to apply to the Court the legislative scheme which had, since 1882, governed the Capitol and which, until 1935, had governed the Court itself. The Government, however, portrays § 13k as the product of a considered Congressional judgment to insulate the Court from *all* outside influence, an objective only partially accomplished by 18 U.S.C. § 1507. Congress, the Government argues, specifically intended § 13k to reach conduct beyond the pale of § 1507, conduct which may be misperceived by the public as influencing the Court, regardless of the true nature of the activity (Government Brief 30, 32, 36).

This argument, however, is premised upon the mistaken assumption that Congress first enacted 18 U.S.C. § 1507 and later, because of the unique constitutional status of the Supreme Court, enacted § 13k to provide protection beyond that offered by § 1507. Actually, comparative analysis of § 13k and § 1507 weakens rather than strengthens the Government's theory. The fact is that while both § 13k and § 1507 were introduced in and considered by the 81st Congress (1st session), § 13k was enacted by that Congress while § 1507 was not enacted until 1950.[13] Pub.L. No. 81-831, 64 Stat. 1018, c. 1024, Title I, § 31(a)(Sept. 23, 1950)(M.A.App. 59a). See n. 9, *supra*. The legislative purpose underlying § 13k is not to provide protection to the Court beyond that provided by § 1507; rather it "is based upon the law relating to the Capitol Buildings and Grounds." H.R.Rep. No. 814, 81st Cong., 1st Sess. 3 (1949) (Grace App. 6a).

Analysis of the legislative history of 18 U.S.C. § 1507 provides several important insights relevant to a determination of § 13k's constitutionality. Section 1507 was but one provision of

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[13] In fact, § 1507, which was part of H.R. 5647, was introduced into the 81st Congress, 1st session, *after* § 13k, which was part of H.R. 4948.

the Internal Security Act of 1950, 64 Stat. 1018 (1950), which entailed a massive legislative effort to control the activities of communists in the United States. Both the Senate and House Reports indicate that § 1507 was enacted in specific response to the recent phenomena of mass demonstrations occurring outside federal courthouses during trials of alleged Communist Party members. *See* S.Rep. No. 732, 81st Cong., 1st Sess. 2 (1949)(Grace App. 12a). Section 1507 was intended to prohibit influence-picketing of pending cases by large crowds, which was seen as denigrating the dignity of the federal courts. *Id.* In stark contrast to the legislative history of § 13k, Congress, before enacting § 1507, carefully considered its impact on First Amendment rights and narrowly tailored the statute to accomplish Congress' objective without unduly infringing upon protected expression:

> Serious consideration has been given to the possibility that this legislation would interfere with the fundamental rights of picketing and free speech. However, it is the opinion of the committee that this statute does not interfere with those rights to such an extent as to render it unconstitutional. It is submitted that this bill is a proper and constitutional restriction on the right of picketing. Nor does your committee believe that it is an undue restriction on freedom of speech within the area protected by the first amendment of the Constitution. The legislation denounces as a crime only that picketing, parading, or causing noises which interferes with the administration of justice.
>
> H.R.Rep. No. 1281, 81st Cong., 1st Sess. 3 (1949)(Grace App. 17a).

Accord, S.Rep. No. 732, 81st Cong., 1st Sess. 4 (1949)(Grace App. 14a).

Comparative analysis of the respective legislative histories of 40 U.S.C. § 193g, 40 U.S.C. § 13k and 18 U.S.C. § 1507 compels the following conclusions: *first*, § 13k tracks the language of, and was modeled after, 40 U.S.C. § 193g; *second*, Congress, in enacting § 193g in 1882 did not consider its First

Amendment implications;[14] *third*, 40 U.S.C. § 13k was adopted to fill the gap created by the District of Columbia's determination that it lacked authority to commission Supreme Court police officers. The Eighty-first Congress did not consider the First Amendment implications of § 13k beyond one statement on the House floor about picketers marching in front of the Court. *Fourth*, § 13k was introduced into legislation *prior to* and was considered *without reference to* 18 U.S.C. § 1507. *Finally*, Congress enacted § 1507 specifically to protect the integrity of the courts in the public mind.

3. The prohibitions of § 13k are so absolute that truly uniform, content-neutral enforcement of its literal terms would lead to absurd results. Indeed, in *Jeannette Rankin Brigade* v. *Chief of Capitol Police*, 342 F.Supp. 575, 586 (D.D.C.) (three-judge court), *aff'd mem.*, 409 U.S. 972 (1972)(hereinafter *Jeannette Rankin II*) the court discussed the Government's recommendation to place a narrowing construction on § 193g, noting:

> without such judicial emendations, so the Government forcefully argues, the present language of the statute is open to absurdities which Congress cannot be taken to have intended.[15]

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[14] Congress did address these concerns in 1967 in Hearings Before the Subcommittee on Public Works, 90th Cong., 1st Sess. (1967). At that time, David Bress, then United States Attorney for the District of Columbia, recognized that § 193g's "outright prohibition without any regulatory steps" created substantial First Amendment problems. *See Jeannette Rankin Brigade* v. *Chief of Capitol Police*, 342 F.Supp. 575, 586 n. 14 (D.D.C.)(three-judge court), *aff'd mem.* 409 U.S. 972 (1972). The proposal to rescind § 193g's absolute prohibition was rejected over strong dissent, but the subcommittee at least acknowledged the First Amendment impact of the regulatory framework. *See* S.Rep. No. 573, 90th Cong., 1st Sess. 2, 5 (1967)(Grace App. 19a, 22a).

[15] The Government argued that the phrase "flag, banner or device" should "include picket signs, placards, and billboards, but not lapel-pins, buttons, name cards, insignias or armbands." *Jeannette Rank-*

Appellees Grace and Zywicki clearly have standing under the Overbreadth doctrine to challenge the statute on its face, and may raise examples of unconstitutional applications to situations not before the Court. *See, e.g., New York* v. *Ferber*, 102 S.Ct. 3348, 3360-61 (1982); *Broadrick* v. *Oklahoma*, 413 U.S. 601, 610-16 (1973). Examples of the overinclusiveness of § 13k need not be hypothesized, however, for the Government itself, in various stages of this and related cases (*see* n. 3, *supra*) has indicated several absurd examples of what it considers prohibited by § 13k.

During argument addressed to the facial constitionality of § 13k in the Superior Court for the District of Columbia in *United States* v. *Turner*, No. M-5572-79 (D.C.Super.Ct. Oct. 2, 1979)(Lodging Exhibit A), the following colloquy occurred between the court and Government counsel:

> The Court: The statute doesn't use the word, picket. Mr. Stetler's concern is that if he would walk up to the Supreme Court and have on the back of his jacket some sign indicating that he was advocating everybody join the Democratic Party, or the Republican Party, or some other party, that he would be in violation of the statute because he's displaying a device which is designed to bring in public notice some organization.
>
> [AUSA] Holmes: That's exactly right, Your Honor.
>
> (Lodging Exhibit A 34).

A similar exchange occurred in *United States* v. *Ebner*, No. M-12487-79 (D.C.Super.Ct. Jan. 22, 1980)(Lodging Exhibit B):

> The Court: What does that mean . . . any flag, banner or device designed or adapted to bring into public notice any

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in II at 586 n. 13. The Government also suggested that "section 193g should not be read literally as forbidding all assemblages, but that it should be taken as providing that there may be no assemblages larger than 15 in number." *Id.*

party, organization or movement. I gather the Iranian flag would do that as well as the American Flag, wouldn't it? What does that mean?

[AUSA] Cornell: Well, I think, Your Honor, that it means that you can't do it.

The Court: You can't carry an American flag on the grounds of the Supreme Court of the United States?

[AUSA] Cornell: Yes, Your Honor.

The Court: Isn't that patent nonsense? They put the flag up in the doorstep every morning, don't they?

[AUSA] Cornell: Well—

The Court: They can do it but others can't.

[AUSA] Cornell: I think that that is the Government's position in this case, Your Honor.

The Court: Well, it seems to me that the Government has to do better, Mr. Cornell.

(Lodging Exhibit B 81).

When Government counsel was asked by the Circuit Court of Appeals in this case whether T-shirts with insignia or mottos were banned from the Court grounds by § 13k, Mr. Lawrence responded, "I'm not sure, Your Honor. I am not sure how that would be addressed" (M.A.App. 73a).

In light of these alarming admissions, the Court should not hesitate to hold § 13k violative of the First Amendment. By its terms it forbids time-honored expression as well as wholly innocent associational activity. The statute's prohibition of standing or moving in "assemblages" clearly applies to groups posing for photographs or filming on the Court grounds (*see* M.A.App. 22a-30a (filming of "First Monday in October"); Lodging Exhibit E 169 (photograph of Island Trees School Board and Steven Pico)). A literal reading of § 13k clearly compels the conclusion that even members of the Court who have posed for photographs outside the Court have violated the statute. *See, e.g., Newsweek* 25 (Oct. 5, 1981)(Lodging Exhibit F 171); *Time* 22 (Oct. 5, 1981)(Lodging Exhibit G 173).

B. Absolute Bans Against Pristine And Time-Honored Forms Of Expression Violate The First Amendment

The fundamental right to distribute handbills was recognized in *Lovell* v. *Griffin*, 303 U.S. 444 (1938), which involved an ordinance that flatly banned the distribution of literature of any kind within the city without first obtaining permission from the city authorities. Lovell was arrested for distributing a religious tract concerning the "Kingdom of Jehovah" without first obtaining a permit. 303 U.S. at 448. This Court reversed, elucidating an inviolable principle of Constitutional law that has survived intact to this day: the First Amendment protects a peaceful leafletter on the public street from the strictures of any licensing law, permit or solicitation laws, or any other form of prior restraint. The *Lovell* Court instructed that freedom of the press "necessarily embraces pamphlets and leaflets," *id.* at 452, and emphasized that leaflets represent expression in its most pristine and coveted form and which "indeed have been historic weapons in the defense of liberty as the pamphlets of Thomas Paine and others in our history abundently attest." *Id. Accord, Schneider* v. *State*, 308 U.S. 147, 160 (1939).

Although the Government may prescribe narrowly drawn regulations pertaining to the time, place or manner of expression, § 13k's absolute prohibition of all forms of expression can only be described as forbidding expression at any time, in any manner, at any place on Supreme Court grounds. Absolute bans on pristine expression, such as § 13k, have not fared well in this Court. *E.g., Talley* v. *California*, 362 U.S. 60 (1960)(city ordinance prohibiting distribution of anonymous handbills); *Jamison* v. *Texas*, 318 U.S. 413 (1943)(local ordinance prohibiting distribution of handbills on the city streets). *Cf. Heffron* v. *International Society for Krishna Consciousness*, 452 U.S. 640, 655 n. 16 (1981)(emphasizing that the state fair's booth rule was not a "total ban on protected First Amendment activity").

The breadth of protection afforded on-the-street leafletting under *Lovell, Schneider, Jamison* and *Talley* approaches absolute protection for orderly, public leafletting during

reasonable hours. This is evidenced by the Court's consistent solicitude for the freedom of citizens to solicit door to door for religious, charitable or political causes, despite the paramount public interest in preserving the privacy of the home from unwanted or fraudulent solicitors. *Larson* v. *Valente*, 102 S.Ct. 1673 (1982); *Village of Schaumburg* v. *Citizens for a Better Environment*, 444 U.S. 620 (1980).

C. The First Amendment Protects Peaceful Expression In Public Places Like Sidewalks And Streets

Whatever else may be said about the nature of the grounds of the Court, it must be admitted that the Court is surrounded by a public sidewalk with all its accouterments, including newspaper vending machines, a bus stop, and pedestrian and vehicular traffic. In fact, it could be described very much like the Court described New Braunfels Avenue, the street at issue in *Flower* v. *United States*, 407 U.S. 197, 198 (1972)(*per curiam*).

The Government argues that the Court's grounds are more akin to the boot camp of Fort Dix at issue in *Greer* v. *Spock*, 424 U.S. 828 (1976), than the street at issue in *Flower*. In *Greer*, however, the base commander had *never* opened the base to the form of expression Spock and others wished to exercise. Here, because the Supreme Court police have allowed the presence of newspaper vending machines only a few feet from where appellees sought to exercise their rights,[16] the Government has allowed some organizations to disseminate their written views while denying that same right to others. No governmental interest, however compelling, can justify according such disparate treatment to the same medium of expression.

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[16] In May 1980, when the Complaint was filed, both *The Washington Star* and *The Washington Post* maintained vending machines in front of the Court (J.S.App. 3a, 4a). As of October, 1982, *The Washington Post* and an adult-oriented tabloid entitled *Met Forum* maintained machines on the sidewalk in front of the Court.

Contrary to the Government's hollow contention that there is no evidence of selective enforcement of § 13k,[17] the Government itself has acknowledged that the presence of the newspaper vending machines violates § 13k:

> Mr. Lawrence: . . . we believe that the statute is uniformly applied to personal conduct . . .
>
> The Court: Mr. Lawrence, I hear you. That machine didn't walk there, it got there by somebody's personal conduct. An agent of the Washington Post put it there. Why isn't his putting it there unlawful? He is displaying a device . . .
>
> Mr. Lawrence: Well, Your Honor, again—
>
> The Court: That person has violated this statute, hasn't he, as it is written?
>
> Mr. Lawrence: It may very well be, Your Honor.
>
> The Court: How could it not be?
>
> Mr. Lawrence: I am not sure, Your Honor. I don't know how it could not be.
>
> (M.A.App. 55a-56a).

Under these circumstances, the Government lacks "standing" to argue § 13k is a "content-neutral" statute uniformly applied to all.

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[17] *See* Government Brief 13 n. 3. As detailed in appellees' Statement, *supra*, at 5 & n. 4, 6, a record was developed through the filing of a verified Complaint, Statements of Material Facts Not in Dispute, admissions made by the Government during hearings, and by the Court of Appeals taking judicial notice of the filming of a movie on the steps of the Court. It is interesting to note that the Government does not hesitate citing the Declaration filed by Marshal Wong as part of "the record" yet this Declaration, accompanying the Government's Motion for Summary Judgment, stands on the same evidentiary footing as the facts relied upon by appellees to support the claims of discriminatory enforcement.

D. The Government Has Not Demonstrated That § 13k Serves A Compelling State Interest

The Government argues that § 13k was enacted to serve the compelling interest of preserving the appearance of justice. As demonstrated above, however, the legislative history belies this notion. Justifications not evident in the legislative history are "not entitled to the same weight as the purposes that actually motivated Congress." *United States Postal Service* v. *Greenburgh Civic Ass'n*, 453 U.S. 114, 153 n. 2 (1981)(Stevens, J., dissenting). Allowing the Government to advance as the primary interest justifying § 13k a concern that was unaddressed by Congress ignores the principle that restrictions on expression must be narrowly drawn to regulate *specific* conduct within the Government's regulatory power.

This Court has required "more than assertion and conjecture," *Landmark Communications Inc.* v. *Virginia*, 435 U.S. 829, 841 (1978), from the Government to support a claim that a particular statute furthers a compelling interest. Where the Government seeks to curtail protected First Amendment rights, the Government bears the burden of producing *evidence* indicating the statute is necessary to serve a recognized and compelling interest. In *Citizens Against Rent Control* v. *Berkeley*, 102 S.Ct. 434, 439, 441 (1981), the Court found Berkeley's failure to produce any such evidence to be a prominent flaw in the city's case. Every member of the Court drew attention to the city's failure to support the claim that a limitation on contributions on behalf of ballot measures was necessary to preserve the integrity of the referendum process—an admittedly legitimate interest. *See* 102 S.Ct. at 439 (Burger, J.), 439 (Rehnquist, J., concurring), 441 (Marshall, J., concurring), 441 (Blackmun, J., with O'Connor, J., concurring).

In the case at bar, the Government has yet to offer a scintilla of evidence indicating either the existence of a compelling governmental interest, or that an asserted interest is *substantially* furthered by § 13k. Nor can the Government hope to evade this requirement by invoking the interest in the "appearance of justice" as a talisman before which the com-

mands of the First Amendment evaporate. Where First Amendment rights are involved, "undifferentiated fear or apprehension of disturbance is not enough to overcome the right to freedom of expression." *Tinker* v. *Des Moines Independent Community School District*, 393 U.S. 503, 508 (1969).

E. Congress Already Has Acted To Protect The Precise Interest Asserted By The Government

Assuming, *arguendo*, the Court allows the Government to advance an interest neither articulated in the legislative history nor proven to be genuinely threatened by the exercise of pristine expression, this interest already is served by virtue of 18 U.S.C. § 1507. As detailed in part I(B), *supra*, Congress' concern to protect federal witnesses, jurors and court officials from influence-picketing during ongoing criminal cases resulted in promulgation of § 1507. The Court of Appeals found that § 1507 "fully addressed" the appearance of justice interest (J.S.App. 22a). The Government's assertion that Congress intended § 13k to provide protection beyond that offered by § 1507 is unsupported by the legislative histories of either section.

The Government's remarkable claim that § 13k is narrower than § 1507 not only defies logic and common sense, but ignores previous admissions by the Government concerning the breadth of § 13k (*Compare*, Government Brief 9, 22 n. 7, 32, *with* Appellees' Petition for Rehearing and Suggestion for Rehearing *En Banc* at 11 (R.Doc. 23)).

The Government's other argument—that invalidation of § 13k would compel the Supreme Court police to rely exclusively on § 1507, with its inherently "content-oriented" focus—is inapposite to the question of § 13k's constitutionality. At bottom, the Government's real complaint concerns the relative difficulty of prosecuting a case under § 1507, as compared to § 13k. This difficulty, however, reflects Congress' effort to closely tailor § 1507 to the specific evil sought to be avoided in a manner least intrusive of other, more protected forms of ex-

pression. Finally, *Cox* v. *Louisiana*, 379 U.S. 559 (1965)(*Cox II*) indicates that in the typical case contemplated by § 1507—influence-picketing about a pending case—circumstantial and direct evidence normally provides ample proof of the intent to influence. In short, picketing a courthouse with a sign reading "Acquit defendant Smith" is one thing; silently standing on Supreme Court grounds with a sign inscribed with the words of the First Amendment is quite another.

The other interests asserted in support of § 13k relate to the dignity and decorum of the Court. These interests, however, are protected by the other unchallenged provisions of 40 U.S.C. §§ 13a-13p (M.A.App. 31a-33a). These sections prohibit, *inter alia*, the sale of commerical material, the discharge of firearms, the making of harangues or orations, and the use of threatening or abusive language on Court grounds. More importantly, § 131 empowers the Marshal to promulgate such regulations "as may be deemed necessary for the adequate protection of the Supreme Court Building and grounds . . . and for the maintenance of suitable order and decorum within the Supreme Court Building and grounds . . ." (M.A.App. 32a).

Thus, there simply is no need for § 13k. Certainly, no showing has been made that less restrictive alternatives have been attempted but found inadequate. *See In re R.M.J.*, 102 S.Ct. 929, 939 (1982). The regulatory authority § 131 vests in the Marshal provides ample means for the Court to preserve dignity and decorum by narrowly drawn regulations directed toward the time, place and manner of expression.

Most important, the Government itself:

> recognize[s], of course, that a single leafletter or demonstrator—or for that matter, most small crowds or a well-behaved large crowd—will usually not create an actual danger of *real or perceived* intimidation of the judiciary.
>
> (Government Brief 25 n. 9)(emphasis added).

F. Peaceable Expression On The Sidewalk Surrounding the Court Is Not Basically Incompatible With Normal Use Of The Sidewalk

The Government seeks to exploit the fact that § 13k applies only to this Court in an effort to frame an argument that the Court's public grounds are not a "public forum" and therefore may be totally closed to persons seeking to exercise their rights. Citing *Cox II* and other "public forum" cases, the Government argues that the Court's grounds are more like a boot camp or a letter box than the public sidewalk that it is. However, neither *Cox II* nor any of the other cases cited by the Government support the theory that a branch of the national Government may be entombed in a coffin of silence.

First, *Cox II* concerned a mass demonstration of 2,000 persons picketing across the street from a *state* courthouse regarding a *pending* criminal case. The Court was careful to point out that "[w]e are not concerned here with such a pure form of expression as a newspaper comment . . . but with expression mixed with conduct." 379 U.S. at 564. *Second*, the Court specifically noted that the statute at issue (which tracked the language of 18 U.S.C. § 1507) was "narrowly drawn to punish specific conduct that infringes a substantial state interest." 379 U.S. at 564. The statute was based on the specific legislative finding that influence-picketing creates a danger that the public might misperceive the effect of mass demonstrations upon the administration of justice. *Third*, the *Cox II* Court emphasized that the narrow and precise terms of the statute left no room for arbitrary or selective enforcement. Section 13k, because of its absurd breadth, virtually *forces* the Marshal to selectively enforce its terms.

Fourth, the *Cox II* Court distinguished the narrow statute at issue from a broad statute prohibiting, for example, picketing "to protest the actions of a mayor or *other official* of a city *completely unrelated to any judicial proceedings*, who just happened to have an office located in the courthouse building." *Id.* at 567 (emphasis added). Here, the Government asserts

that the Supreme Court building contains "only the Court and related offices" (Government Brief 27). The Court should take judicial notice, however, that a multitude of activities occur in the Court wholly unrelated to the Court's Article III function. Also located in the Court, for example, are offices of the curator, clerk, librarian, administrative aides as well as a library, cafeteria, gift shop, exhibit area and a gymnasium.[18]

Fifth, mass influence-picketing of a state courthouse concerning a controversial pending case is qualitatively different than pristine expression exercised by a lone leafletter on the public sidewalk surrounding a branch of the national Government. Although the Supreme Court obviously is a court, its unique character as the only constitutionally required court distinguishes it from all other courts. *See* section I(G), *infra*. Moreover, neither witnesses nor juries frequent the Court's grounds, a fact which heavily influenced the drafters of 18 U.S.C. § 1507.

The other cases cited by the Government in support of its argument that peaceful expression may be prohibited on Supreme Court grounds are even less relevant than *Cox II*. In *United States Postal Service* v. *Council of Greenburgh Civic Association*, 453 U.S. 114 (1981), community civic associations seeking to place their circulars in residential letter boxes argued that the boxes were a "public forum." The Court, analyzing the traditional uses of letter boxes, rejected this claim noting that the association still could reach its intended audience merely by placing their circulars inside the resident's door.

In *Heffron* v. *International Society for Krishna Consciousness*, 452 U.S. 640 (1981), the Court upheld a state fair's rule

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[18] If a recognized historian disagreed with the Supreme Court Historical Society's treatment of Chief Justice John Marshall, for example, § 13k would prohibit the historian from distributing leaflets in front of the Court explaining his or her view of the great Chief Justice.

that groups soliciting or selling articles must operate from a fixed location within the fairgrounds. The Court noted that ISKCON members were free to orally proselytize their views throughout the fairgrounds, 452 U.S. at 655, and that the booths were located in areas where visitors were expected. *Id.* at n. 16. More importantly, the Court distinguished the rule from a total ban, and noted the differences between a fairgrounds and a public street. *Id.*

Other cases such as *Jones* v. *North Carolina Prisoners' Labor Union, Inc.*, 433 U.S. 119 (1977); *Greer* v. *Spock*, 424 U.S. 828 (1976); and *Adderley* v. *Florida*, 385 U.S. 39 (1966), all involve places possessing unique characteristics which justify certain restrictions on First Amendment rights. None of these cases involved pure expression exercised upon or directed toward the apex of a branch of government.

Essentially, the "public forum" doctrine emerged as a response to the argument that the First Amendment forbids denying access to *any* government property. *See Lehman* v. *City of Shaker Heights*, 418 U.S. 298 (1974) (advertising space on city transit vehicles). Where government property is normally open to the public without restriction, however, as in *Flower* v. *United States*, 407 U.S. 197 (1972), the Government's power to restrict protected expression depends upon "whether the manner of expression is basically incompatible with the normal activity of a particular place at a particular time." *Grayned* v. *City of Rockford*, 408 U.S. 104, 116 (1972). Where the exercise of a particular form of expression is not "basically incompatible" with the normal use of the place, the Government may not prohibit exercise of the expression, even when the location in question is in an area over which the Government has broad regulatory control. *See Tinker* v. *Des Moines Independent Community School District*, 393 U.S. 503 (1969). *Grayned* itself involved picketing across from a school.

The Government has made no showing that the presence of a lone leafletter is "basically incompatible" with normal use of the sidewalk surrounding the Court. In light of the constant

influx of tourists, students, attorneys, and pedestrians on the Court sidewalk, it is doubtful such a showing ever could be made. The Government itself concedes that small groups of demonstrators pose no real or apparent threat to the administration of justice (Government Brief 25 n.9). Finally, it deserves note that the three-judge court in *Jeannette Rankin II* found that the public areas of the Capitol grounds "have traditionally been open to the public . . ." 342 F.Supp. at 584.

The last justification proffered in support of § 13k's absolute ban is the symbolic status of the Court as the "focus of aspirations for an independent judiciary" (Government Brief 38). But the grace and awesome beauty of the Supreme Court building naturally acheives this purpose, as does the epithet "Equal Justice Under Law" carved into the facade of the building. Moreover, if the Court symbolizes anything, it is the historically unique commitment of this nation to freedom of expression.

G. Because Of The Supreme Court's Unique Constitutional Status As A Branch Of Government, Interests In Preserving The Appearance Of Justice Do Not Justify A Wholesale Ban On Expression Throughout The Court's Grounds

The basic premise of the Government's contention that the First Amendment is inapplicable to Supreme Court grounds is that the judicial branch should not be subjected to political passions more properly addressed to the two elected branches of government. The first Congress, however, in debating the proposal which became the First Amendment, specifically rejected the notion of restricting the rights of petition and assembly to the Legislative branch.

Madison's original draft of the First Amendment, as proposed in the House of Representatives, provided:

> The civil rights of none shall be abridged on account of religious belief or worship, nor shall any national religion be established, nor shall the full and equal rights of conscience be in any manner, or on any pretext, infringed.

> The people shall not be deprived or abridged of their right to speak, to write, or to publish their sentiments; and the freedom of the press, as one of the great bulwarks of liberty, shall be inviolable.
>
> The people shall not be restrained from peaceably assembling and consulting for their common good; nor from applying to the Legislature by petitions, or remonstrances, for redress of their grievances.
>
> 1 *Annals of Congress* 434 (J. Gales ed. 1789).

The final version, of course, guaranteed the right to petition "the Government" which obviously includes all *three* branches.

Thus, however compelling the governmental interest may be in preserving federal district and circuit courts from the appearance of injustice flowing from mob picketing, the weight of this interest diminishes with regard to pure expression exercised on Supreme Court grounds because of the Court's unique constitutional status as the seat of the judicial branch of government. While interests in decorum and dignity might justify regulating the time, place and manner of expression on Court grounds, an absolute ban contravenes the intent of the Framers to secure peaceful political expression from the repressive tendencies of government. As Madison explained to the first assembled House of Representatives, "The right of freedom of speech is secured; the liberty of the press is expressly declared to be *beyond the reach of this Government.*" 1 *Annals of Congress* 738 (J. Gales ed. 1789) (emphasis added).

The Supreme Court cannot avoid being a political institution. The Court's decisions have impacted on the lives of all Americans. Many issues which have divided the nation also have divided the Court. Yet the integrity of the Court, as an institution, and the public's respect for it, has not diminshed.

In recent years, the appointment of Justices has become a matter of political controversy. In the 1970's the Senate refused to confirm two of President Nixon's nominees to the Court. More recently, the nominations of Justices Rehnquist and O'Connor generated substantial publicity. Questioning during the Senate confirmation hearings touched upon several

of the most controversial issues of our times. *See Hearings on the Nomination of Sandra Day O'Connor before the Senate Committee on the Judiciary*, 97th Cong., 1st Sess. 107-08, 198-99, 218 (1981)(regarding views on abortion); *Hearings on the Nomination of William H. Rehnquist and Lewis F. Powell, Jr. Before the Senate Committee on the Judiciary*, 92d Cong., 1st Sess. 33 (1971)(regarding views on the Vietnam War).

Significantly, the Court itself does not appear overly concerned about remaining independent of all outside influence. Several of the Justices, including the Chief Justice, have delivered speeches articulating their views on a variety of issues and subjects. Additionally, *The Washington Post* recently reported revival of the abandoned custom of the Justices dining with the President a few days before opening of the Court's term. *The Washington Post*, Sept. 13, 1982, at A3, col. 1. If the Court finds no appearance of justice problem in dining with the President (who has been a party to several cases in recent years), then surely that interest is not implicated by a lone leafletter addressing issues unrelated to the administration of justice.

Analytically, the governmental interest in preserving the appearance of justice is a subset of the more general interest in preserving the integrity of a governmental function or process. The Court has encountered, in a variety of contexts, First Amendment challenges to statutes designed to further such interests. *E.g.*, *Brown* v. *Hartlage*, 102 S.Ct. 1523, 1528 (1982) (integrity of the electoral process); *Citizens Against Rent Control* v. *Berkeley*, 102 S.Ct. 434, 438 (1981) (integrity of the referendum process); *Landmark Communications, Inc.* v. *Virginia*, 435 U.S. 829, 841 (1978)(maintenance of confidence in the judicial system). The Court applied the rigorous strictures of First Amendment analysis to each of these cases and found the state had failed to sustain the heavy demonstration necessary to justify restricting rights of expression.

Landmark Communications reveals a significant countervailing interest against constricting access to the Court

grounds. As Chief Justice Burger aptly observed, "[t]he operations of the court and the judicial conduct of judges are matters of utmost concern." 435 U.S. at 839. The Court, in a long line of cases, has recognized that our commitment to self-rule requires that the judicial system be subject to both observation and comment. *E.g.*, *Globe Newspaper Co.* v. *Superior Court*, 102 S.Ct. 2613 (1982); *Richmond Newspapers, Inc.* v. *Virginia*, 448 U.S. 555 (1980); *Craig* v. *Harney*, 331 U.S. 367 (1947); *Bridges* v. *California*, 314 U.S. 252 (1941).

The *Bridges* line of cases establishes a strong policy favoring access to, and the right to comment about, courts. Although judges obviously are human, and therefore theoretically susceptible to influence, this does not mean they should be totally isolated from comment. If "it is assumed that judges will ignore the public clamor or media reports and editorials in reaching their decisions . . ." *Landmark Communications, supra*, 435 U.S. at 839 (Burger, J.), then surely Justices are able to withstand the innocuous presence of a solitary leafletter distributing handbills unrelated to the Court's function.

Finally, severing the Court grounds from reach of the First Amendment would deprive many people, particularly indigents, of any opportunity to persuade persons frequenting Court grounds of the merits of a particular issue. It is easy for the Government, with its unlimited resources, to say that poor people have nothing to lose if § 13k is upheld. The Government's frequent filing of *amicus curiae* briefs provides but one example of the Government's ready access to the Court. Contrary to the Government's claim that the financially distressed have no interest in being on Court grounds, presence on Court grounds affords accesss to some of the nation's leading constitutional lawyers. Who is to say that one of these attorneys might not be persuaded by a modest leaflet to contribute his or her time to a meritorious cause?

H. Vesting The Marshal With Standardless And Absolute Discretion For Enforcement of § 13k Violates The First Amendment

If the Marshal enforced the literal terms of § 13k, the statute undoubtedly would have been challenged and invalidated long ago. But § 13k is *not* uniformly enforced. Rather, the Marshal apparently has decided for himself what it allows and what it precludes. This the Constitution forbids. *Thornhill* v. *Alabama*, 310 U.S. 88, 97 (1940).

The District Court, for example, observed that "[a]rguably; neither section 13(k) (nor 18 U.S.C. § 1507), by their terms, reach an individual carrying a message on a sign or in pamphlets or leaflets, unassisted by any other person and without apparent attempt to interfere with or influence the Supreme Court or its officials" (J.S.App. 62a). The Marshal, however, interprets and applies § 13k to *all* expressive conduct.

The continued presence of *The Washington Post* and adult-tabloid vending machines, allowing filming of movies and other "assemblages," the daily lowering and raising of the flag, and the Metro bus stop sign are all prohibited by the express terms of § 13k. Yet the Marshal only enforces § 13k against persons exercising pristine First Amendment rights. Allowing *The Washington Post* to disseminate its particular views, while denying Mr. Zywicki and Ms. Grace the same opportunity, highlights not merely the *dangers* of selective enforcement inhering in § 13k's vague, overinclusive terms, but the *reality* of discriminatory application. This Court previously has emphasized that where a statute is properly challenged on overbreadth grounds, the facts of the case itself may " 'well illustrate the statute's potential for sweeping and improper application.' " *Bigelow* v. *Virginia*, 421 U.S. 809, 817 (1975), *quoting*, *Gooding* v. *Wilson*, 405 U.S. 518, 532-33 (1972). This is such a case.

I. Even Assuming The Legitimacy Of The Government's Asserted Interest In Preserving The Appearance Of Justice, § 13k Is Both Fatally Overinclusive And Underinclusive

The Court of Appeals found § 13k substantially overinclusive because it prohibits a broad range of activity unrelated to the administration of justice (J.S.App. 27a).[19] Counsel will not rehearse here the many previously cited examples of even innocent associational activity prohibited by § 13k. Unlike the statute upheld in *Cabell* v. *Chavez-Salido*, 102 S.Ct. 735, 740-41 & n.8 (1982), § 13k "is so broad and haphazard as to belie the state's claim that it is only attempting to ensure that an important function of government be in the hands of [citizens]." *Id.* at 741.[20]

Equally fatal to § 13k is its glaring underinclusiveness. Given the Government's primary argument that § 13k is necessary to serve the compelling interest in preventing any public misperception of the influence of demonstrations on the Court, it is difficult to see how demonstrations in or across the street from the Court—which the Government *would* allow—would not be seen by the public as potentially influencing the Court.

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[19] In *Cabell* v. *Chavez-Salido*, 102 S.Ct. 735, 740-41 & n. 8 (1982), the Court noted a distinction between the constitutional doctrine of "overbreadth" and the claim that a statute is unconstitutionally "overinclusive." Overbreadth, the *Cabell* Court explained, is merely a doctrine of standing "applicable in certain First Amendment cases and under which litigants may assert the rights of others not presently before the Court." *Id.* Overinclusiveness refers to a statute which is so sweeping as to render unpersuasive any claim that it protects and furthers a compelling state interest. There are cases subsequent to *Cabell*, however, which continue to refer to overbreadth in the sense of overinclusiveness. *E.g.*, *New York* v. *Ferber*, 102 S.Ct. 3348, 3360-63 (1982).

[20] Judge Hannon, during oral argument in the Superior Court challenging the facial validity of § 13k, candidly observed, concerning the second portion of § 13k: "If that's not overbroad, I don't know what in the world is." *United States* v. *Ebner*, M-12487-79 (D.C. Super.Ct. Jan. 22, 1980) (Lodging Exhibit B 80).

The logical inconsistency in the Government's position results from its effort to persuade the Court that ample alternatives exist for expression (*e.g.*, Government Brief 7, 11, 14): "Section 13k leaves demonstrators free to choose a site for their expressive activity anywhere in the vicinity of the Supreme Court, and there is no reason to believe that they will be taken less seriously because they are not on the same square block as the Court itself" (Government Brief 17)(*Accord*, *id.* at 8 (demonstrations across the street would be "unlikely to attract less attention than a demonstration on the sidewalk in front of the Court")); *id.* at 23 n. 7 (§ 13k still allows demonstrations "at locations that scarcely diminish their impact").

Thus, § 13k suffers from the same sort of underinclusiveness that persuaded the Court in *Erznoznik* v. *City of Jacksonville*, 422 U.S. 205 (1975), to strike down an ordinance against drive-in theatres showing films which included nude scenes visible from the public roadway. Failure of the statute to prohibit other sorts of activity which created the same risks to traffic rendered the ordinance fatally underinclusive. *See New York* v. *Ferber*, 102 S.Ct. 3348, 3359 & n. 18 (1982); *Cabell*, *supra*, 102 S.Ct. at 742 n. 12 (1982); *Carey* v. *Brown*, 447 U.S. 455 (1980). Also, candor requires recognizing that persons in a tourist bus who pass by the Court's grounds would be unable to distinguish a small, orderly demonstration from one of the many picture-taking and other assemblages routinely allowed by the Marshal.

To fully achieve the all encompassing interest in the appearance of justice asserted by the Government, a statute would have to prohibit all assemblages within a one-block radius of the Court. Only in this manner could the Government effectively prevent public misperception occasioned by the exercise of expression near the Court. Needless to say, such a statute would not fare well in this Court.

Indeed, if the Government truly were committed to the goal of preserving the appearance of the Court's impartiality, it would not have appealed this case for, by doing so, the *Govern-*

ment has created the appearance (if not the reality) of requiring the Court to decide a case in which the Court itself is involved.[21]

J. Section 13k's Absolute Ban On Expression Is Not "De Minimis"

The Government's argument that § 13k is but a minimal abridgement of liberty is incredible (Government Brief 6, 11, 13, 21). A leafletter who wants to reach persons frequenting the grounds of the Court cannot do so from across the street. Persons with signs would need placards the size of billboards in order to render their message visible to persons on Court grounds. More importantly, "one is not to have the exercise of his liberty of expression abridged on the plea that it may be exercised in some other place." *Schneider* v. *State*, 308 U.S. 147, 163 (1939); *accord*, *Spence* v. *Washington*, 418 U.S. 405, 411 n. 4 (1974).

Although the Court differs functionally from the Legislative and Executive branches, it is still a *co-equal* part of the Government. Its processes rightly are subject to public scrutiny. The Government's argument that the Court is an inappropriate place for expression ignores the decision of the Framers to render *each* branch of government accessible to the people. It is not surprising that the Government disagrees with the balance struck by the Framers in favor of freedom of ex-

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[21] As discussed in section III, *infra*, except for the Chief Justice and Justice O'Connor, the Court need not disqualify itself *unless* the Court is of the view that, for whatever reason, the Court possesses some unique characteristic which elevates it above every other court, every other branch of government, and even above the Constitution itself. The separation of powers question raised by such a conclusion is formidable. Equally disturbing is the premise that a branch of government may, by fiat, exempt itself from whichever commands of the Constitution it finds inconvenient. *See United States* v. *Nixon*, 418 U.S. 683 (1974); *Youngstown Sheet & Tube Co.* v. *Sawyer*, 343 U.S. 579 (1952).

pression, but the Framers considered and rejected the notion of limiting the right of assembly to the Legislative branch of government. *See* H. Black, *The Bill of Rights*, 35 N.Y.U. L.Rev. 865, 879 (1960).

II. SECTION 13k VIOLATES DUE PROCESS CONSIDERATIONS OF BOTH THE FIRST AND FIFTH AMENDMENTS

A. Section 13k Is Unconstitutionally Vague

As noted in section I(A)(1), *supra*, even Judge MacKinnon acknowledged the vagueness of the term "device," which he concluded must "include any object that is capable of display" (J.S.App. 32a). The potential application of this term to include lapel pins and buttons led the Government in *Jeannette Rankin II* to argue for a limiting construction of the statute. 342 F. Supp. at 586 n. 13.

Due process of law requires that persons of ordinary intelligence be clearly apprised as to what the law allows and what it forbids. *City of Mesquite* v. *Aladdin's Castle, Inc.*, 102 S.Ct. 1070, 1074 (1982); *Grayned* v. *City of Rockford*, 408 U.S. 104 (1972). No one may be required at the peril of life, liberty, or property, to speculate as to the meaning of penal statutes. *Smith* v. *Goguen*, 415 U.S. 566, 572 n. 8 (1974). Moreover, where a statute has a potentially inhibiting effect on expressive activity, the statute is subject to strict judicial scrutiny. *Hynes* v. *Mayor of Oradell*, 425 U.S. 610 (1976).

Vague laws like § 13k, which fail to provide explicit standards for those who apply them, invite arbitrary and discriminatory enforcement. *Grayned*, *supra*, 408 U.S. at 108; *Kunz* v. *New York*, 340 U.S. 290 (1951). Such laws operate, as has § 13k, to inhibit the exercise of First Amendment freedoms.

Thus, even if the Court finds § 13k consistent with other First Amendment principles, its incurable vagueness requires invalidation on First and Fifth Amendment due process

grounds.[22] Where even the lawyer for the Government is uncertain as to the statute's meaning (Lodging Exhibit D 163), the Court certainly cannot expect citizens of ordinary intelligence to understand what the law forbids.

Morover, vague laws are not susceptible to a limiting construction, *Hynes*, *supra*, 425 U.S. at 622, particularly where to do so would require the Court to rewrite the statute, which clearly is Congress' function. Even were the Court to consider a limiting construction, the record indicates that the officers on the scene are unlikely to follow it.[23] In these circumstances, a limiting construction is inappropriate.

B. In Light Of The Marshal's Arbitrary Policy Of Enforcement, § 13k Violates Equal Protection Principles

Assuming, *arguendo*, that a statute constitutionally could prohibit all expressive activity on Supreme Court grounds, § 13k, as enforced by the Marshal, allows some individuals and organizations to exercise their First Amendment rights while arbitrarily denying that same right to others. Allowing *The Washington Post* to *sell* its newspapers while threatening Mr. Zywicki with arrest for trying to *give away* his handbill violates the equal protection guarantees of the First and Fifth Amendments. *See Police Department of Chicago* v. *Mosley*,

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[22] These arguments were advanced by appellees Grace and Zywicki in both the District Court and the Court of Appeals. Although the Circuit Court held the statute unconstitutional on First Amendment grounds, the Court has recognized that appellees may advance in this Court any grounds, based on the record, supporting the judgment below. *Schweiker* v. *Hogan*, 102 S.Ct. 2597, 2607 n. 24 (1982).

[23] In *United States* v. *Ebner*, *supra* at n. 3, Judge Hannon of the District of Columbia Superior Court placed a narrowing construction on § 13k to require proof of an intent to influence (*see* Lodging Exhibit B 90). This fact did not, however, persuade the Supreme Court police to narrow their interpretation of the statute as evidenced by the police ordering Mr. Zywicki off Court grounds on February 4, 1980 (*see* Complaint, ¶¶ 17-20, M.A.App. 6a).

408 U.S. 92, 95-96 (1972); *Bolling* v. *Sharpe*, 347 U.S. 497 (1954).

C. Section 13k Is Unconstitutional As Applied

Should the Court uphold § 13k on its face, the Court nevertheless should hold § 13k unconstitutional in its application. The record of discriminatory enforcement brings § 13k within the rule of *Mosley*, *supra*, where the Court emphasized that "government may not grant the use of a forum to people whose views it finds acceptable, but deny use to those wishing to express less favored or more controversial views." 408 U.S. at 95-96. *See Carey* v. *Brown*, 447 U.S. 455 (1980).

If the Court harbors any doubt concerning the adequacy of the record on this issue, appellees request the Court to remand the case for further development of the record.

III. THE APPEARANCE OF PARTIALITY WHICH NATURALLY AND REASONABLY ARISES FROM THIS COURT RULING ON THE CONSTITUTIONALITY OF A STATUTE THAT APPLIES ONLY TO SUPREME COURT GROUNDS REQUIRES EACH JUSTICE TO CONSIDER MANDATORY DISQUALIFICATION UNDER 28 U.S.C. § 455

A. Except For The Chief Justice And Justice O'Connor, Only Those Justices Who Agree That Interests Unique To The Supreme Court Justify An Absolute Ban Of Expression On Court Grounds Need Disqualify Themselves Under 28 U.S.C. § 455(b)

The primary justification asserted by the Government in support of § 13k is protection of the appearance of justice (Government Brief 38 & n. 16). Yet the Government, having thus asserted an interest applicable *only* to this Court, conspicuously fails to address the obvious disqualification issue[24] necessarily raised by 28 U.S.C. § 455 (1976).[25]

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[24] The disqualification issue was initially raised by the Government (J.S. 14). Although noting "special concerns" relating to the Chief Justice (*id.*), the Government urged the other Justices to reach the merits, suggesting that "any doubts should be resolved against disqualification" (*id.* at 15). This assertion completely ignores the express Congressional intent in amending 28 U.S.C. § 455 to "enhance public confidence in the impartiality of the judicial system" by, *inter alia*, eliminating the judicially created "duty to sit" which required resolution of close cases against disqualification. *See* 28 U.S.C. § 455 (1976); P.L. No. 93-512, § 1, 88 Stat. 1609, Dec. 5, 1974. H.R.Rep. No. 1453, 93d Cong., 2nd Sess. 2 (1974), *reprinted in* 1974 U.S. Code Cong. & Ad. News 6351, 6354-55.

[25] It could be argued that disqualification under 28 U.S.C. § 455 is a threshold question which must be resolved before turning to the merits of the case. *See United States* v. *Will*, 449 U.S. 200, 212 (1980). With the exception of the Chief Justice and Justice O'Connor, whose disqualifications are also required by other subsections of § 455(b), the timing for resolution of the question of disqualification is not

This "paramount" interest, however, is not what moved Congress to enact § 13k. It is what motivated promulgation of § 1507 one year *after* § 13k became law. If the Court agrees that § 1507 and other statutes amply protect the Court, or that § 13k violates traditional First Amendment tests, the members of the Court are not disqualified under 28 U.S.C. § 455(b)(5)(iii) because the Court has no interest which is greater than that possessed by the other branches of government, or which justifies the absolute ban on expressive conduct contained in § 13k. However, should any member of the Court accept the theoretical possibility that there exists an interest in this Court or its members which is greater than those interests identified and rejected with respect to the other branches of government, then automatic mandatory disqualification is required under § 455(b)(5)(iii) since every member of the Court would have an interest that "could be substantially affected by the outcome of the proceeding." 28 U.S.C. § 455(b)(5)(iii).[26]

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critical to the outcome of the case since disqualification is unnecessary unless the Court accepts the Government's arguments on the merits. Therefore, rejection on the merits of the Government's defense of § 13k evaporates any grounds for mandatory disqualification. Logically, the Court must address the merits of the case in order to determine whether it has an interest which triggers the provisions of § 455.

[26] Each Justice also may be disqualified under § 455(a) which states that a Justice "shall disqualify himself in a proceeding in which his impartiality might reasonably be questioned." Simply by asking the Court to rule on the constitutionality of § 13k, the Government has created a situation in which each Justice's impartiality could reasonably be questioned, thus requiring disqualification under § 455(a). However, unlike disqualification under § 455(b), disqualification under § 455(a) can be waived by the parties after "full disclosure on the record of the basis for disqualification," § 455(e). For that reason, the question of disqualification under § 455(a) properly must be addressed on the record at oral argument.

B. The Chief Justice And Justice O'Connor Must Disqualify Themselves Under Mandatory Provisions Of 28 U.S.C. § 455(b) Which Are Inapplicable To The Other Members Of The Court

Unlike the other members of the Court whose grounds for mandatory disqualification under 28 U.S.C. § 455(b)(5)(iii) disappear with the rejection of the Government's arguments in support of § 13k, the Chief Justice and Justice O'Connor must disqualify themselves under § 455(b) for other reasons. Specifically, the Chief Justice must disqualify himself because he is a party to the proceeding, § 455(b)(5)(i), because he has "personal knowledge of disputed evidentiary facts," § 455(b)(1) (for example, regarding policies of enforcement), and because he has an official interest which likely will be affected by the outcome of the case, § 455(b)(5)(iii).

Although the Chief Justice declined to appeal the decision of the court below, he remains an omitted party in this Court with an official interest in the case. As such, the Chief Justice is free to reenter the case at his will by merely notifying the Clerk of the Court and the parties that he has an interest in the appeal. Rule 10.4, The Supreme Court Rules. *See* R. Stern & E. Gressman, *Supreme Court Practice* § 6.20, 441-44 (5th ed. 1978).

Additionally, in light of the *Newsweek* (Lodging Exhibit F 171) and *Time* (Lodging Exhibit G 173) photographs depicting the Chief Justice and Justice O'Connor in processions and assemblages, both the Chief Justice and Justice O'Connor should disqualify themselves. The Government contends that the case contains no "findings" regarding selective enforcement of § 13k. Appellees have argued that ample proof of selective enforcement exists in the record, but that if additional proof is thought necessary a remand to the District Court for the taking of evidence is required. If the case is remanded, Justice O'Connor's family members, and perhaps even the Justice herself (and the Chief Justice), could be material witnesses in the trial of this matter on the question of dis-

criminatory enforcement, § 455(b)(5)(iv). Moreover, the Chief Justice and Justice O'Connor necessarily would possess "personal knowledge of disputed evidentiary facts" concerning the statute as applied, § 455(b)(1). In these circumstances, disqualification is appropriate.

CONCLUSION

The Framers, in response to the age-old query, "are we to act with greater purity than the rest of [hu]mankind," J. Madison, *Notes of Debates in the Federal Convention of 1787* 229 (statement of G. Bedford) (Norton 1966), drafted a Constitution founded on the principle that no person or agency of government is above the law; not the President, not the Congress, and certainly not this Court:

> Shall any [person] be above Justice? Above all shall that [person] be above it, who can commit the most extensive injustice?
>
> *Id.* at 331 (statement of G. Mason).

Appellees urge the Court to affirm the judgment of the Court of Appeals by holding that § 13k, on its face, is repugnant to the First and Fifth Amendments. In the alternative, appellees urge the Court to hold § 13k unconstitutional as applied, or, if the Court is uncertain about the sufficiency of the present record on this issue, to remand the case for development of a record.

However, any member of the Court who concludes that the Court possesses some unique characteristic which justifies exempting itself from the fundamental First Amendment precepts which it has applied to all *other* governmental agencies and officials, should invoke disqualification.

Respectfully submitted,

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